UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

LAWRENCE DARREN MOLDER, Plaintiff, v. BNSF RAILWAY COMPANY, a Delaware corporation, Defendant.	NO: 2:18-CV-0257-TOR ORDER GRANTING DEFENDANT BNSF RAILWAY COMPANY'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is Defendant BNSF Railway Company's Motion for Summary Judgment (ECF No. 32). The Motion was submitted without a request for oral argument. The Court has reviewed the files and the record, and is fully informed. For the reasons discussed below, the Motion for Summary Judgment (ECF No. 32) is **granted**.

STANDARD OF REVIEW

A movant is entitled to summary judgment if the movant demonstrates "there is no genuine dispute as to any material fact and that the movant is entitled

to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is "genuine" where the evidence is such that a reasonable jury could find in favor of the non-moving party. *Id.* The moving party bears the "burden of establishing the nonexistence of a 'genuine issue.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). "This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party." *Id.*

In deciding, the court may only consider admissible evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). As such, the nonmoving party may not defeat a properly supported motion with mere allegations or denials in the pleadings. *Liberty Lobby*, 477 U.S. at 248. At this stage, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant's] favor." *Id*. at 255. However, the "mere existence of a scintilla of evidence" will not defeat summary judgment. *Id*. at 252.

Per Rule 56(c), the parties must support assertions by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." The court is not

obligated "to scour the record in search of a genuine issue of triable fact[;]" rather, the nonmoving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (brackets in original) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)). Summary judgment will thus be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

FACTS[1]

This case arises out of Plaintiff Lawrence Darren Molder's employment with Defendant BNSF. In short, Plaintiff asserts (1) BNSF terminated him out of retaliation for Plaintiff reporting injuries in 2009 and 2017, in violation of the Federal Railroad Safety Act ("FRSA"), and (2) BNSF is liable under the Federal Employer Liability Act ("FELA") for negligently causing the 2017 injury. ECF No. 1 at 5-7, ¶¶ 19-29,

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[1] The following are the undisputed material facts unless otherwise noted. All genuine disputes have been resolved in favor of Plaintiff as the non-moving party.

1. **Plaintiff begins employment; 2009 injury, suit, and settlement**

Plaintiff began his employment with BNSF in 2003 as a laborer on a "tie gang." ECF No. 32 at 2. Sometime in 2009, Plaintiff suffered a work-related injury involving a rail puller and filed a FELA lawsuit three years later in October 2012. ECF Nos. 1 at 2-3, ¶¶ 7-8; 32 at 2. After more than four years of litigation, BNSF Claims Representative Josh Gore agreed to a settlement amount with Plaintiff's counsel on January 13, 2017. ECF No. 32-9 at 2, ¶ 5. Thereafter, Gore sent the proposed settlement to Plaintiff's counsel. ECF No. 32-9 at 2, ¶ 6. Plaintiff, through counsel, sent BNSF a signed release on March 17, 2017. ECF No. 32-9 at 2, ¶ 6; 76 at 2, ¶ 3.

2. **BNSF discovers workplace violations**

Meanwhile, Plaintiff continued to work at BNSF throughout litigation. By 2016, Plaintiff worked as a Foreman on a three-person "surfacing crew." ECF No. 32 at 3. On November 21, 2016, Hal Lewandoski,[2] BNSF Manager of Roadway Planning, was inspecting the Columbia River subdivision when he saw Plaintiff's crew equipment was not being used. ECF No. 32-8 at 50. Lewandoski asked a nearby track inspector where Plaintiff's crew was, but the inspector said he did not know. ECF No. 32-8 at 50. Lewandoski then "went up to where there was

[2] Plaintiff's manager was on vacation. ECF No. 77 at 2, ¶ 5.

supposed to be work being performed [and] asked the foreman [of a different crew] for the section [] where the surfacing crew was." ECF No. 32-8 at 50-51. According to Lewandoski, "[t]hey kind of laughed it off, and [told Lewandoski that Plaintiff's crew] looked at it and said they didn't think they could repair it and they had other things to do." ECF No. 32-8 at 50. Lewandoski "made the comment about [there] being a lot of track and time" – meaning work could be performed at that time – and "they just laughed and said, well, this is pretty normal. They disappear around noon every day."[3] ECF No. 32-8 at 50. Lewandoski tried to contact Plaintiff, but he could not reach him. ECF No. 32-8 at 53.

Lewandoski talked with his boss at the time, David Thornton, and they "decided to look at the GPS log to see how they were spending their day." ECF No. 32-8 at 50-51. The GPS information for the surfacing crew truck did not "match[] up" with Plaintiff's reported time for work—"the vehicle was off territory

[3] Plaintiff argues the third-party's statement is hearsay. ECF No. 43 at 17. However, it is relevant to Lewandoski and BNSF's state of mind (i.e. believing there was an issue with Plaintiff leaving his work site), and is not used to support the truth of the matter asserted (the GPS logs provide the basis for Plaintiff's whereabouts).

prior to end of shift. And the times paid did not match the vehicle's location." ECF No. 32-8 at 52. For example, for November 21, 2016, Plaintiff reported that he worked a full eight hours surfacing track, plus 30 minutes of unauthorized overtime.[4] However, the GPS information showed Plaintiff's work truck was at his home by 2:11 p.m.—before his shift ended (3:00 p.m.). ECF No. 32-1 at 5, ¶ 20; *see* ECF No. 43 at 20, ¶ 20 (Plaintiff not disputing the proposed fact). Plaintiff argues that he was getting fuel, ECF No. 43 at 3, but his fuel card transactions demonstrate otherwise, ECF No. 71 at 7, and this still does not explain why his

[4] Plaintiff asserts that he thought he was entitled to charge for time spent making nightly reports, despite the fact that Rule 61 clearly, in simple terms, states otherwise. ECF No. 32-11 at 66 ("Foremen . . . having crews of more than five (5) men working under their jurisdiction . . . who are required to keep time, make material and other reports outside of the assigned working hours of the general force, will be allowed four (4) hours in such month . . . as compensation therefor. This allowance will not be made where timekeepers or assistant foreman are employed, or where foreman have crews of less than six (6) men."). In any event, BNSF found Plaintiff violated *multiple* work-place rules and Plaintiff's contention about what work is compensable does not explain why his vehicle was at his home before the end of his shift.

vehicle was at his home *before* his shift ended. A review of additional reported time demonstrated that Plaintiff "had repeatedly left work before the end of his scheduled shift and claimed paid time (including overtime) while at home or at a hotel." ECF No. 43 at 20, ¶ 22.

Lewandoski thought "it looked like [Plaintiff] was paying himself excessively outside of what the GPS logs for the truck state." ECF No. 32-8 at 55. Lewandowski turned over the information "to the managers who were subsequently involved in the investigation and disciplinary decision[;]" Lewandoski was no longer involved. ECF No. 77 at 2-3, ¶ 5.

3. **BNSF investigation**

BNSF has a disciplinary policy known as "PEPA" (Policy for Employee Performance Accountability), which lists three levels of discipline: Standard, Serious, and Stand-Alone Dismissible. ECF No. 43 at 23, ¶ 30. "Stand-Alone Dismissible" conduct includes "Theft or any other fraudulent act that may be evidenced by . . . taking of BNSF monies or property not due" and "Dishonesty about any job-related subject[.]" ECF No. 43 at 23, ¶ 31. When an employee is subject to termination, BNSF holds an investigation hearing. ECF No. 32-3 at 2, ¶ 5. After BNSF holds an investigation hearing, a member of the "PEPA Team" makes a recommendation after reviewing the transcript of the investigation and the hearing exhibits. ECF No. 32-3 at 2, ¶ 5.

BNSF initiated an investigation and sent Plaintiff a notice (dated December 9, 2016) to attend an investigation hearing; the notices state: "An investigation has been scheduled . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged violations that occurred on or about August 15 to November 21, 2016 . . . . Alleged violations include, but are not limited to, leaving your assignment and paying yourself for being on assignment without proper authority and dishonesty for paying yourself for time you were not working." ECF No. 32-5 at 2. After several mutually agreed postponements, ECF No. 32-5 at 3-8, an investigation hearing was held on February 15, 2017, to determine if a violation occurred; Plaintiff was provided with a union representative at the hearing. ECF No. 43 at 21, ¶ 24.

PEPA Team member Brian Clunn was assigned to Plaintiff's case and conducted a review of the investigation materials. Clunn determined that the charges were proven, and recommended Plaintiff be terminated because Plaintiff "committed stand-alone dismissible rule violation", including "13 separate occasions between August 15, 206 and November 21, 2016 [where Plaintiff] falsely claimed overtime[.]" ECF No. 43 at 25-26, ¶ 33; ECF No. 32-5 at 2. General Director Line Maintenance David Thornton accepted Clunn's recommendation, ECF No. 43 at 26, ¶ 34, and Plaintiff was terminated on March 14, 2017, ECF No. 1 at 3, ¶ 12.

4. **February 2017 Injury**

On February 27, 2017, before Plaintiff was terminated, but after BNSF held the investigation hearing, Plaintiff began working on a "mini tie gang" as a Spiker Machine Operator. ECF No. 43 at 29, ¶ 39. On Plaintiff's first day on the job, the crew was assigned to remove concrete railroad ties. ECF No. 43 at 29, ¶ 40. "Because a Spiker does not operate on concrete ties, [Plaintiff] worked on the ground as a laborer, which he and all machine operators are qualified and expected to do when not operating their machines." ECF No. 43 at 29-30, ¶ 41.

"Foreman Doug Martin tasked [Plaintiff and ten plus] other laborers assigned to use a hand tool called a de-clipper, or 'Harley,' designed to remove rail clips from concrete railroad ties." ECF No. 43 at 30, ¶ 42. Harleys are designed solely for removing rail clips—they are not used for any other task. ECF No. 73 at 68, ¶ 45. The tool is designed for use by one person, but employees occasionally work together on one Harley. ECF No. 73 at 68, ¶ 46. Although at least one hydraulic machine was available for the project, Martin "chose to use it to re-install clips, instead of de-clip" because it was faster to use the Harleys in lieu of the machine(s). ECF No. 43 at 30, ¶ 43 (Plaintiff disputing number of hydraulic

machines available). According to Plaintiff, he told Martin: "we have machines to do this[,]" but did not say using the Harleys was dangerous. ECF No. 73 at 66-67.

Plaintiff inspected his Harley for defects before and during use and found there was nothing wrong with the tool. ECF No. 73 at 69, ¶ 47. From the first clip, Plaintiff felt soreness in his back just picking up the tool and struggled with the Harley, testifying that he "didn't like what [he] was doing from the first clip[,]" he "was tired and winded", and that he "didn't belong there." ECF No. 73 at 71-72, ¶¶ 52-54. Plaintiff did not ask co-workers for help. ECF No. 73 at 70-71.

Plaintiff began falling behind the rest of the crew when an Assistant Foreman stated: "Come on, Molder. Hurry up." ECF No. 73 at 71, ¶ 51, at 73, ¶ 56. As Plaintiff recalled: "I was having difficulty with the rocks. And I was taking the time to bend over, get down on a knee" to remove the rocks when the assistant foreman told him to hurry up. ECF No. 43-15 at 128. Plaintiff replied: "These rocks are in my way, and this is too much. I can't get them." ECF No. 43-15 at 128. The assistant foreman then grabbed the Harley from Plaintiff, stating: "This is how you do it. You grab it. You squeeze it. You push it forward, and you yank it back." ECF No. 43-15 at 128. Plaintiff asserts that he was "ordered" to stop removing the rocks between the clips based on this exchange. ECF No. 73 at 75.

Plaintiff continued to work to remove the clips with the Harley. ECF No. 43-15 at 129. Although Plaintiff tried to keep up as best as he could, (1) he did not

change the way he was using the Harley, (2) he continued to use the tool in the proper manner with proper body mechanics, (3) he continued to inspect his work environment, and (4) he took sufficient time to perform his job tasks safely. ECF No. 43-15 at 91, 99-100, 128-29. The only difference is that Plaintiff "increase[d] the speed with which he was removing clips by leaving whatever rocks were between them and the ties." ECF No. 73 at 81.

Plaintiff testified that he removed several hundred clips that day before he was injured. ECF No. 43-15 at 83. While he was sore from the beginning, Plaintiff alleges he was removing a clip when he was stricken with "numbing pain" in his back that shot all the way down his leg, "felt something letting go[,]" and "suddenly got sick to [his] stomach[.]" ECF No. 43-15 at 88. Plaintiff did not lose his footing and did not recall whether or not there were rocks in the final clip. ECF No. 73 at 78-79, ¶¶ 63-64.

DISCUSSION

A. Retaliation - The Federal Railroad Safety Act (FRSA)

"A claim for unlawful retaliation under the FRSA has two stages: the prima facie stage, *see* 49 U.S.C. § 42121(b)(2)(B)(i)–(ii); 29 C.F.R. § 1982.104(e), and the substantive stage, *see* 49 U.S.C. § 42121(b)(2)(B)(iii)–(iv); 29 C.F.R. § 1982.109(a)–(b)." *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 459 (9th Cir. 2018). "At the substantive stage, a violation will be found 'only if the complainant

demonstrates that any [protected activity] *was* a contributing factor in the unfavorable personnel action alleged in the complaint.'" *Id.* at 460 (emphasis and brackets in original) (quoting 49 U.S.C. § 42121(b)(2)(B)(iii)). "The complainant must prove the substantive case by a preponderance of the evidence." *Id.* (citing 29 C.F.R. § 1982.109(a). Then, "the employer can defeat the retaliation claim 'if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity].'" *Id.* (brackets in original) (quoting 49 U.S.C. § 42121(b)(2)(B)(iv)).

Plaintiff asserts that he was terminated because he reported an injury in 2009 (and subsequently brought suit based on said injury) and because he reported an injury in 2017. *See* ECF No. 32 at 11. Defendant argues there is no evidence of retaliation and that there is clear and convincing evidence it would have terminated Plaintiff irrespective of him reporting his alleged injuries. The Court agrees with Defendant.

As for the 2009 injury, Plaintiff asserts that he was terminated the day after he entered into the settlement agreement for the 2009 injury—attempting to create a temporal connection between this injury and his termination. However, BNSF did not receive the *signed* agreement until days *after* the termination. Further, it is undisputed that Gore, the BNSF Claims Representative, did not discuss the

settlement with anyone in "operations" while settlement discussions were ongoing. ECF No. 32-8 at 47. Gore specifically testified that he never discussed Plaintiff's 2009 FELA case with David Thornton (General Director Line Maintenance), Lewandoski (Manager of Roadway Planning), or Jeff Stiver (Plaintiff's supervisor). ECF No. 32-8 at 47. Additionally, Thornton and Clunn testified that, at the time they made their respective decisions, they did not know Plaintiff litigated his 2009 injury. ECF No. 32-3 at 4, ¶ 9. Plaintiff also attempts to raise an issue about why BNSF first investigated his time keeping activities in November of 2016, but the undisputed facts demonstrate BNSF had good reason to begin their investigation.[5] Plaintiff argues there is other circumstantial evidence of retaliation,

[5] Plaintiff asserts that BNSF did not have a legitimate motive for investigating him because (1) a "supervisor admitted to [Plaintiff] that BNSF was looking for a reason to terminate him"; (2) "it is not at all clear why a crew not being at the jobsite during lunchtime would cause BNSF to suspect a violation"; and (3) BNSF didn't call anyone on the crew before pulling Plaintiff's time records." ECF No. 43 at 18. However, the record does not support the first assertion, *see* ECF No. 43-15 at 212-213, 232-233; there was ample basis for concern given another crew informed Lewandoski about Plaintiff's crew leaving early, and Lewandoski did try to contact Plaintiff.

but the Court dispels this assertion below. As such, Plaintiff has failed to provide any evidence to tether the 2009 injury (and the subsequent litigation and settlement) to his termination.

As for the 2017 injury, Plaintiff asserts there is circumstantial evidence of retaliatory intent. First, Plaintiff argues there is temporal proximity between Plaintiff reporting his injury on February 27, 2017 and his termination on March 14, 2017. ECF No. 45 at 8-10. However, it is undisputed that BNSF began its investigation into Plaintiff's time records months before the alleged injury occurred, as BNSF discovered the potential issue on November 21, 2016 and Plaintiff was terminated on March 14, 2017. It is true that the alleged injury occurred approximately two weeks prior to the ultimate termination, but this shroud of apparent temporal proximity is cleared away by the fact that (1) the underlying investigation was well underway by this point, (2) there is no evidence BNSF changed course after Plaintiff reported the 2017 injury, and (3) the decisionmakers (Thornton and Clunn) were not aware of the injury or the reporting thereof.[6] *See* ECF Nos. 32-3 at 4, ¶ 9 (Clunn); 32-14 at 2, ¶ 6 (Thornton).

[6] Plaintiff argues that "[i]t is not a huge leap in logic to infer . . . that at least one manager who played a role in Molder's termination was aware of Molder's protected activity." ECF No. 15-16. The Court disagrees. In any event, Plaintiff

Importantly, BNSF's allegations against Plaintiff remained consistent and the resulting decision is supported by the evidence in the record. For the same reasons, Defendants have also provided clear and convincing evidence that they would have terminated irrespective of his reporting the 2017 injury.

Second, Plaintiff argues there are "indications of pretext" by pointing to "BNSF maintaining a compensation structure that incentivizes retaliation"; "BNSF not taking issue with his time reporting until after he engage in protected activity"; and "BNSF investigating only him despite each of his coworkers also have been absent from the jobsite." ECF No. 45 at 10. However, the compensation structure is markedly tenuous evidence of pretext, at best; BNSF took issue with the time reporting *before* the alleged 2017 injury[7] and many years *after* the 2009 injury and *after* BNSF found Plaintiff off-site on November 21, 2016; and it was Plaintiff's duty to fill the time cards as a crew for which he was the foreman (Plaintiff must

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cannot rely on bald inferences without admissible evidence at this stage of litigation.

[7] Contrary to the facts in the record, Plaintiff asserts that "BNSF took no exception to any such violation until after [Plaintiff] reported his back injury". ECF No. 45 at 10.

show similarly situated employees were treated differently—these employees worked *under* Plaintiff).

Third, Plaintiff states that he "can show [] BNSF inconsistently applied the applicable rules". ECF No. 45 at 11. Plaintiff asserts (1) he was the only employee charged with a violation of the rule prohibiting employees from leaving the jobsite even though his coworkers (i.e. the members of his crew working *under* him) had left the site, also; and (2) Plaintiff is the only employee who has been terminated for improperly paying himself despite the practice being common. ECF No. 45 at 11. As for the first point, the treatment of those working *under* Plaintiff is not evidence of a similarly situated employee being treated dissimilarly—he was the foremen who entered the times for the crew and he was charged with more than just leaving the jobsite early. Further, leaving the jobsite was not Plaintiff's only noted violation.

As to the second point, Plaintiff asserts that there are other employees who were not terminated even though BNSF found they engaged in "worse" conduct than Plaintiff, but Plaintiff failed to demonstrate the employees were similarly situated or that their conduct was worse than Plaintiff's. *See* ECF Nos. 43 at 5-8; 71 at 5-6; 73 at 19-23; 77 at 2, ¶ 3 (Lewandoski declaration refuting Plaintiff's claim that a similarly situated employee was treated different than Plaintiff—"[h]e did not engage in repeated dishonesty, nor had he repeatedly gone home early

without authority[,]" and he was not "a foreman"). Notably, Plaintiff provides some details as to one of the proposed comparators, but this comparator is still not similarly situated because the employee acknowledged his error and the decision to not let him go was not made by Thornton or Clunn. ECF No. 71 at 6. Further, this comparator had reported two workplace injuries, cutting against Plaintiff's contention that BNSF retaliates against those reporting injuries. ECF No. 71 at 6-7.

Notably, Clunn testified that he was aware of at least four other employees that BNSF dismissed for similar misconduct and provided evidence demonstrating such. ECF No. 32-3 at 4, ¶ 10; *see* ECF No. 32-6 at 5 (employee dismissed for falsification of payroll and hours of service over a four-day period), at 11 (foreman dismissed for falsified payroll over a three-day period), at 16 (crew member terminated for falsified time slip records), at 22 (foreman demised for falsely reporting time over a six week period). Plaintiff asserts that "BNSF has not demonstrated . . . the situations of their terminations are in any way similar to [Plaintiff's] termination[,]" and that this only show "BNSF treated five employees differently than everyone else[.]" ECF No. 45 at 11. However, BNSF need not prove such—it is Plaintiff's burden to present dissimilar treatment of like employees; BNSF provided this evidence to negate Plaintiff's claim that his termination was an anomaly only explained by animus.

Finally, Plaintiff argues (1) BNSF provided shifting explanations for his termination and (2) that a reasonable person could find Plaintiff did not violate workplace rules, but these contentions are all squarely contradicted by the record. ECF No. 45 at 12-14; *see* ECF No. 71 at 8-10.

Accordingly, because Plaintiff has not presented any evidence of retaliation and Defendant has presented clear and convincing evidence they would have terminated Plaintiff irrespective of his protected activities, Defendant is entitled so summary judgment on Plaintiff's FRSA retaliation claim.

B. **The Federal Employer's Liability Act (FELA)**

"Section 1 of FELA provides that '[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.'" *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994) (emphasis added) (quoting 45 U.S.C. § 51). FELA is "liberally construed [] to further Congress' remedial goal." *Id.* at 543. The Supreme Court has determined "that a relaxed standard of causation applies under FELA" where "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* (citing *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957)).

> That FELA is to be liberally construed, however, does not mean that it is a workers' compensation statute. We have insisted that FELA "does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is [the employer's] negligence, not the fact that injuries occur."

Id. (quoting *Ellis v. Union Pacific R. Co.*, 329 U.S. 649, 953 (1947).

Plaintiff argues that BNSF's negligence caused his February 2017 injury. Plaintiff asserts BNSF was negligent for ordering Plaintiff to use a Harley to remove clips without proper training, for telling him to "hurry up" when he fell behind the crew, and for allegedly ordering him to forgo removing rocks before using the Harley to remove clips. *See* ECF Nos. 1 at 3, ¶ 10 ("Molder injured his back because BNSF ordered him to remove the clips with a d-clipper"); 45 at 18. Notably, Plaintiff's argument on the point is very limited and quite conclusory. *See* ECF No. 45 at 18-19.

First, there is no evidence Plaintiff being told to hurry or that he should skip removing rocks from the clips led to his harm. Importantly, Plaintiff testified that, after being told to hurry, he (1) did not change the way he was using the Harley (he continued to use the tool in the proper manner with proper body mechanics), (2) continued to inspect his work environment, and (3) took sufficient time to perform his job tasks safely. ECF No. 43-15 at 91, 99-100, 128-29. Instead, Plaintiff asserts that he "increase[d] the speed with which he was removing clips by leaving whatever rocks were between them and the ties." ECF No. 73 at 81. As such, the

call to hurry only caused Plaintiff to skip cleaning the rocks out from between the clips and the railroad ties. However, Plaintiff does not recall whether rocks were present in the final clip that allegedly caused his injury. ECF No. 43-15 at 86. Plaintiff thus fails to connect the demands (to hurry and skip picking out rocks) with his injury.

Second, Plaintiff has also failed to provide evidence that Plaintiff needed additional training to use a Harley or that ordering Plaintiff to use a Harley to remove clips was negligent. First, Plaintiff admits that he did not need any additional training on how to use a Harley before his injury, stating that using a Harley is "cut and dry" and "[t]here's no way to over think it[,]" ECF No. 73 at 70. Second, Harleys are specifically designed to remove railroad clips. ECF No. 43 at 30, ¶ 42. While the task of removing the clips may be onerous, and liable to give the employees a sore back, there is no evidence others reported being injured by using a Harley. *See* ECF No. 43-6 at 44. Indeed, although Plaintiff testified that he thought the Harley was too dangerous to use because "it's too hard on your body[,]" ECF No. 43-15 at 82, Plaintiff (1) could not recall ever hearing that anyone else was injured from the tool, ECF No. 43-15 at 83, and (2) Plaintiff had assigned laborers to work with Harleys on past projects without incident when he was a foreman. ECF No. 73 at 71, ¶ 50.

Plaintiff points to his own deposition and the deposition of Tim Gillum, Plaintiff's union representative, to support his contention that Harleys "are widely regarded as a dangerous tool, the use of which is to be limited to when machines are not available and there are not many clips to be removed." ECF No. 73 at 65-66. However, while Gillum stated he used a Harley as little as possible because it was "just killer on the body" (particularly the back), that the Harleys are not safe, and that "if you jerked wrong, it could be injury[,]" Gillum testified that he knew of "a lot of sore backs" but couldn't recall anyone being *injured* while using the Harley. ECF No. 43-6 at 43-45. Gillum also testified that a crew would usually try to rotate workers so you do not have employees working the Harley multiple days in a row. ECF No. 43-6 at 45. However, it was Plaintiff's first day on the job in this position and he does not assert he used a Harley the previous day.

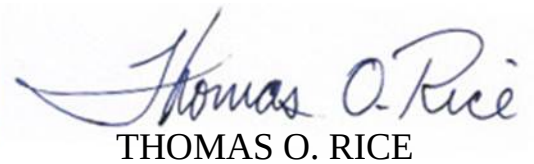
Ultimately, Plaintiff flatly admitted that, other than not use the tool, there was nothing he could have done to prevent the injury. ECF No. 43-15 at 123. However, Plaintiff has not presented any evidence that BNSF was negligent in ordering him to use the tool, especially without evidence that others had been injured when operating this commonly-used tool. With a history of use without any accidents, Plaintiff cannot say that BNSF acted negligently or otherwise failed "to do that which a person of reasonable prudence would have done under like circumstances." *Schulz v. Pennsylvania R.R. Co.*, 350 U.S. 523, 525 (1956).

ACCORDINGLY, IT IS ORDERED:

1. Defendant BNSF Railroad Company's Motion for Summary Judgment (ECF No. 32) is **GRANTED**.
2. The pending objections and the remaining Motions (ECF Nos. 41; 42; 48; 53; 54; 80) are **DENIED AS MOOT**.
3. All remaining hearings and trial are **VACATED**.

The District Court Clerk is directed to enter this Order, enter judgment for Defendant, provide copies to counsel, and **close** the file

DATED August 28, 2019.



THOMAS O. RICE
Chief United States District Judge